78-946

No.

In the Supreme Court of the United States

OCTOBER TERM, 1978

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL., PETITIONERS

v.

BURLINGTON NORTHERN, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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CITATIONS

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The Solicitor General, on behalf of the Equal Employment Opportunity Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 582 F.2d 1097. The order of the district court (App. C, *infra*) is unreported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*) was entered on August 15, 1978. On November 6, 1978, Mr. Justice Stevens extended the time for filing a petition to and including December 13, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 709(e) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-8(e), prohibits the Equal Employment Opportunity Commission from disclosing to a charging party information the Commission has gathered in the course of its investigation relating to the charging party's claim.

STATUTES AND REGULATIONS INVOLVED

Section 706(b) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(b), provides, in pertinent part:

> * * * Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. * * * If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of

> such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. * * *

Section 709(e) of the Act, 42 U.S.C. 2000e-8(e) provides:

> It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this title involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than one year.

Section 1601.22 of the Equal Employment Opportunity Commission regulations, 29 C.F.R. 1601.22, provides:

> Confidentiality.
>
> Neither a charge, nor information obtained pursuant to section 709(a) of Title VII, nor information obtained from records required to be kept or reports required to be filed pursuant to section 709(c) and (d) of Title VII, shall be made

matters of public information by the Commission prior to the institution of any proceedings under this Title involving such charge or information. This provision does not apply to such earlier disclosures to charging parties, or their attorneys, respondents or their attorneys, or witnesses where disclosure is deemed necessary for securing appropriate relief. This provision also does not apply to such earlier disclosures to representatives of interested Federal, State, and local authorities as may be appropriate or necessary to the carrying out of the Commission's function under Title VII, nor to the publication of data derived from such information in a form which does not reveal the identity of charging parties, respondents, or persons supplying the information.

STATEMENT

Following the filing of a Commissioner's charge in 1974,[1] the Equal Employment Opportunity Commission began investigating the employment practices of respondent Burlington Northern, Inc. The investigation sought to explore the allegation that Burlington had engaged in widespread employment discrimination, in violation of Sections 706 and 707

[1] A charge of employment discrimination may be filed with the Commission by an individual claiming to be aggrieved (the "charging party") or by a member of the Commission. 42 U.S.C. 2000e-5(b). After furnishing a copy of the charge to the employer, the Commission investigates the charge, and if the Commission determines on the basis of its investigation that there is reasonable cause to believe that the charge is true, it seeks to resolve the charge informally through conference, conciliation, and persuasion (*ibid.*).

of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5 and 2000e-6. In the course of the investigation, Burlington provided information and documentary materials to the Commission (App. A, *infra*, 2a).

Two individuals, who had filed discrimination charges against Burlington before the Commissioner's charge was filed, requested and obtained right-to-sue letters from the Commission.[2] They then filed an action against Burlington on behalf of a nationwide class of Burlington's black employees and applicants for employment.

Following the institution of that action, the two individual plaintiffs served a subpoena on the Commission seeking production of all the documents that had been collected in the course of the Commission's investigation of Burlington. The Commission notified Burlington that it intended to comply with the subpoena. Burlington then filed this action in the United States District Court for the Northern District of Illinois seeking to bar the Commission from producing the subpoenaed materials. Burlington argued that disclosing the materials in the Commissioner's charge investigative file would violate the prohibition in Section 709(e) of the Civil Rights Act against making public "any information obtained by the Commission pursuant to its authority

[2] A charging party has the right to bring suit on his claim 180 days after the filing of his charge, if the Commission has not brought suit or entered into a conciliation agreement to which he is a party. Before filing suit, the charging party obtains a right-to-sue letter from the Commission. 42 U.S.C. 2000e-5(f)(1).

under this section prior to the institution of any proceeding under this title involving such information." Because the two charging parties had instituted a Title VII action, Burlington conceded that the Commission could lawfully release to each charging party materials relating to that party's individual charge. But to release to the two class representatives the materials collected in the course of the general investigation of Burlington's employment practices, Burlington argued, would violate Section 709(e) (App. A, *infra*, 2a-5a).

The district court refused to grant injunctive relief (App. C, *infra*). It held that the disclosure of information to private charging parties did not constitute "public" disclosure within the meaning of Section 709(e) and that the production of the materials in the Commissioner's charge file, subject to the restrictions on the use of those materials imposed by the Commission's regulations, would not violate the statute.[3]

The court of appeals reversed. It rejected the Commission's position, embodied in its regulations, that disclosure to charging parties is not disclosure to the "public" within the meaning of Section 709(e). The court held instead that "individual charging

[3] The court adopted as its findings of fact and conclusions of law its statements at a hearing on Burlington's motion for a preliminary injunction. The court stated at the hearing that "this is not * * * a disclosure to the public, it is a disclosure to a litigant who, indeed, as Congress has pointed out, is a private Attorney General for the enforcement of civil rights complaints" (C.A. App. 15).

parties are members of the public under § 709(e) to whom investigatory materials, may not be disclosed prior to the initiation of judicial proceedings" (App. A, *infra*, 9a). The court recognized that Section 709(e) permits the release of information after the institution of a suit under Title VII if that suit "involv[es] such information." Accordingly, it acknowledged that the two individuals who had brought the Title VII class action against Burlington could be given investigative materials relevant to their individual claims. But the court held that the full contents of the national Commissioner's charge investigation could not be revealed to them. At least until a class is certified, the court held, only those materials directly related to the individual claims of the two named plaintiffs could be released (App. A, *infra*, 10a-12a).

REASONS FOR GRANTING THE PETITION

1. As the court of appeals acknowledged, the decision in this case conflicts with that of the en banc Fifth Circuit in *H. Kessler & Co.* v. *Equal Employment Opportunity Commission*, 472 F.2d 1147, cert. denied, 412 U.S. 939 (1973). There the court held that disclosure to a charging party of material in the investigative file relating to the charge is not public disclosure of the type forbidden by Section 709(e). Although that case involved the disclosure of materials relating only to an individual charge, the court of appeals declined to distinguish *Kessler* on that ground. Instead, the court premised its decision

on the ground that the prohibition of Section 709(e) applies to charging parties to the same degree as to all other members of the public, thus flatly disagreeing with the holding in *Kessler*.[4]

It is important to the Commission that this conflict be resolved. Since the effective date of Title VII, the Commission has taken the position, approved in *Kessler*, that disclosure to the parties directly involved in a charge[5] does not constitute "public" disclosure within the meaning of Section 709(e) of the Act. See 29 C.F.R. 1601.22. The uncertainty generated by the decision in this case has created doubt

[4] The Court of Appeals for the District of Columbia Circuit has also held that charging parties are members of the "public" within the meaning of Section 709(e). *Sears, Roebuck and Co.* v. *Equal Employment Opportunity Commission*, 581 F.2d 941 (1978). The *Sears* court distinguished *Kessler* on the ground that it involved a single charge by one individual, not a national Commissioner's charge. *Id.* at 947. The court of appeals in this case, however, declined to adopt this distinction and flatly disagreed with the holding in *Kessler* that charging parties are not members of the public under Section 709(e) (App. A, *infra*, 9a).

[5] The parties involved in a charge, in the Commission's view, include the charging party, the employer, witnesses, and other governmental agencies. 29 C.F.R. 1601.22. The Commission's regulations authorize it to disclose to an employer information obtained from others during an investigation when doing so would aid conciliation. Disclosure of investigative materials to witnesses is permitted when disclosure would promote the purposes of the investigation. There is no question that disclosure to other governmental agencies is lawful, since governmental agencies are not the "public" for purposes of Section 709(e). See *Sears, Roebuck and Co.* v. *Equal Employment Opportunity Commission, supra*, 581 F.2d at 947.

whether Commission personnel can lawfully apply the Commission's routine disclosure policy. Particularly in light of the fact that Section 709(e) is a criminal statute, this uncertainty needs to be resolved.

Moreover, the court's construction of Section 709(e), if allowed to stand, may adversely affect the Commission's ability to perform its statutory functions. Under the court's interpretation of Section 709(e), the Commission would apparently be prohibited, at least without consent,[6] from disclosing materials in the investigative file to either the charging party or the employer, even when disclosure would facilitate conciliation. Moreover, if the Commission cannot reveal material in its investigative file prior to litigation, it might be prohibited from disclosing in its reasonable cause determination the facts that led it to find reasonable cause to believe that the charge is true. In any event, the Commission must know what it can or cannot reveal in carrying out its statutory duties of fact finding and conciliation.

2. The Fifth Circuit in *Kessler* employed what we believe to be the proper analysis of the "public disclosure" prohibition of Section 709(e). The court there noted that the legislative history of this provision, although meager, nonetheless supports the Commission's interpretation. Senator Humphrey, when introducing the nondisclosure provision that

[6] Section 709(e) does not specifically provide that materials can be disclosed with consent, but we do not believe that disclosure with consent would be a violation of the statute.

was eventually enacted, explained that the ban on public disclosure did not prohibit "such disclosure as is necessary to the carrying out of the Commission's duties under the statute." 110 Cong. Rec. 12723 (1964). He added (*ibid.*):

> Obviously, the proper conduct of an investigation would ordinarily require that the witnesses be informed that a charge had been filed and often that certain evidence had been received. Such disclosure would be proper. The amendment is not intended to hamper Commission investigations or proper cooperation with other State and Federal agencies, but rather is aimed at the making available to the general public of unproven charges.

As the *Kessler* court pointed out, although the term "make public" is not defined in the Act, it is used in another section of the Act in a manner that supports the Commission's interpretation of the term. That provision, Section 706(b), 42 U.S.C. 2000e-5 (b), states that the Commission shall furnish the employer with a copy of the charge, but such "[c]harges shall not be made public." The same section further provides that the Commission shall undertake to conciliate charges but that nothing said or done as a part of the conciliation proceedings "may be made public by the Commission * * * without the written consent of the persons concerned." Since the employer is thus to be informed about the charge, and since the employer and the aggrieved person must be parties to any conciliation, both the charge and matters

arising in the course of conciliation proceedings will ordinarily be known or made known to both the charging party and the employer. Accordingly, the use of the term "public" in Section 706(b) plainly contemplates disclosure to persons other than the charging party and the employer. Absent some suggestion that the term was meant to carry a different meaning when used in Section 709(e), the term "make public" in that provision similarly should not be read to encompass the employer and the charging party.

The suggestion of the court below that disclosure of materials in the investigative file would stir up litigation also appears erroneous. At least as applied to individual charging parties, the court's construction of Section 709(e) could well have the opposite effect. If individual charging parties could not obtain materials in the Commission's files until after they have brought suit, they might well be encouraged to use litigiation as an investigative tool and to postpone serious settlement negotiations until after suit has been filed and the Commission's investigative materials have been obtained.

Contrary to the suggestion of the court of appeals, the 1972 amendments to the Civil Rights Act did not in any way undermine the rationale of the *Kessler* decision. The language of Section 709(e) was not changed, and there is therefore no reason to suppose that Congress intended to alter the scope of its ban on publicizing investigative materials. See *International Brotherhood of Teamsters* v. *United*

States, 431 U.S. 324, 354 n.39 (1977).[7] The court's suggestion that Congress in 1972 intended private employment discrimination actions to play a less prominent role in civil rights enforcement is erroneous. Congress in 1972 was careful to preserve the private right of action. See *Occidental Life Insurance Co.* v. *Equal Employment Opportunity Commission*, 432 U.S. 355, 361-366 (1977). This Court noted in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 45 (1974), that even after the 1972 amendments gave enforcement authority to the Commission, "the private right of action remains an essential means of obtaining judicial enforcement of Title VII." Nothing in the 1972 amendments can be regarded as implicitly changing Congress' original intention, long recognized in Commission practice, that the statutory prohibitions against publicizing information were not to apply to disclosures to the parties directly involved in the charge.

3. The holding of the court of appeals that the charging parties are members of the "public" within the meaning of Section 709(e) was not sufficient to dispose of the case. The prohibition against disclosing information obtained in Commission inves-

[7] With respect to conciliation, Congress changed the language of former Section 706(a), which permitted disclosure upon the "consent of the parties," to the present language of Section 706(b), which requires the "consent of the persons concerned." There is no explanation in the legislative history for this change and no suggestion that a modification in substance was intended.

tigations applies only "prior to the institution of any proceeding under [Title VII] involving such information." Because the two individual plaintiffs had already filed suit at the time they sought access to the investigative file information, the prohibition of Section 709(e) did not apply to them. But the court nonetheless prohibited release of the materials in the Commissioner's charge file on the ground that, "[a]t least prior to certification of a class, the investigative information 'involv[ed]' in a private Title VII action, within the meaning of Section 709(e), is only that directly relevant to the individual plaintiff's claims." Because the nationwide investigative file contained a great deal of material that was not directly concerned with the individual charges filed by the two class representatives, the court held that the only information that could be disclosed to the plaintiffs would be the information in that file that either was or would normally have been gathered in the investigations of the two individual charges.

This was error. The nationwide class action filed by the two charging parties was plainly a proceeding "involving" the information in the nationwide investigative file. The fact that a class had not yet been certified does not alter the nature of the action. As this Court has held in different contexts, during the period prior to the certification ruling, a class action proceeds as if the alleged class were properly certified. See *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538, 551-552 (1974) ("Rule 23 is not designed to afford class action representation only to

those who are active participants in or even aware of the proceedings in the suit prior to the order that the suit shall or shall not proceed as a class action"); *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385, 392-393 (1977). As the Advisory Committee Notes state, the decision not to certify a class "means that the action should be stripped of its character as a class action." 28 U.S.C. App. p. 7767. Thus, prior to the time of the certification ruling, the class action brought by the two charging parties should be regarded as a class action, not a suit by two individuals. Because the nationwide class action plainly "involv[es]" the information in the Commissioner's charge file, the court erred in holding that Commission officials would violate Section 709(e) if they responded to the class representatives' subpoena.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 1978

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 78-1486

BURLINGTON NORTHERN, INC., PLAINTIFF-APPELLANT,

and

BROTHERHOOD OF RAILWAY, AIRLINE & STEAMSHIP CLERKS, ETC., INTERVENING PLAINTIFF-APPELLANT,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; ETHEL BENT WALSH, Commissioner, Equal Employment Opportunity Commission; BRUCE ELFVIN, Senior Trial Counsel, Equal Employment Opportunity Commission; and ODAS NICHOLASON, Assistant General Counsel, Equal Employment Opportunity Commission, DEFENDANTS-APPELLEES,

and

WILLIAM E. MCBRIDE, WILLIAM H. BUTLER, INTERVENING DEFENDANTS-APPELLEES.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 78 C 1257—JOHN POWERS CROWLEY, *Judge*

Argued May 30, 1978—Decided August 15, 1978

Before PELL and BAUER, *Circuit Judges*, and HARPER, *Senior District Judge.**

PELL, *Circuit Judge.* In response to a wide-ranging charge by Commissioner Ethel Bent Walsh, the Equal Employment Opportunity Commission began a national investigation into possible discrimination in employment by Burlington Northern, Inc. During the course of the patulous investigation, Burlington has voluntarily cooperated with the Commission by answering numerous interrogatories and providing substantial quantities of documents and records.[1] The national investigation has been consolidated with the Commission's processing of approximately 60 individual discrimination charges against Burlington. Burlington has also voluntarily provided materials dealing specifically with at least some of these charges.

After the Commission's investigation began, William McBride and William Butler, two black Burlington employees, requested and obtained right-to-sue letters from the Commission (*see* 42 U.S.C. § 2000e-

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* Senior Judge Roy W. Harper of the Eastern and Western Districts of Missouri sat with the panel by designation and heard oral argument. He thereafter disqualified himself from further consideration of the case, and did not participate in the preparation or issuance of this opinion.

[1] Burlington says that among the information disclosed to the Commission was a substantial amount of confidential and sensitive business information. The Commission does not deny this. The information is not part of the record in the case, so we cannot determine the truth of Burlington's assertion, but our disposition of the issue before us does not turn on its truth or falsity.

5(f)) and filed a private action on behalf of a nationwide class of black employees of and applicants for employment with Burlington.[2] A former employee, Roy Hill, has filed an action on behalf of a class located in the Northern District of Illinois,[3] and DuBois Gilliam filed a complaint originally purporting to represent a class of black Burlington employees in Nebraska and Iowa, but which he now is seeking to amend to expand the class to national scope.[4]

A number of individual charging parties have requested access to the Commission's national investigatory file on Burlington. Given the Commission's policy of cooperating with private litigants by providing them relevant information (broadly defined) subject to a promise not to make the information public, *see* EEOC Compliance Manual §§ 83.7(c), 83.3(b), 83.4, 83.5, it is assumed that the Commission will honor these requests if allowed to do so. This case arises from a concrete instance, however, in which no assumptions as to the future are necessary. McBride and Butler have subpoenaed the Commission to produce all documents in the Burlington investigation file, and the Commission has advised Burlington that it will comply with the subpoena. Burlington filed this action to enjoin release of the information

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[2] *McBride* v. *Burlington Northern, Inc.*, No. 78 C 269 (N.D. Ill.).

[3] *Hill* v. *Burlington Northern, Inc.*, No. 78 C 308 (N.D.Ill.).

[4] *Gilliam* v. *Burlington Northern, Inc.*, No. Civ. 77-0-423 (D.Neb.).

in the Commission's investigation file. The district court denied all relief, and Burlington appealed.

The issue before us may be simply put: to what degree may the Commission release information gathered in a national investigation of an employer's practices to an individual prosecuting a private class action attacking those practices? Section 709 of Title VII, 42 U.S.C. § 2000e-8, gives substantial investigatory powers to the Commission, and also provides the limit to its power to disclose the information gathered in the investigation. Subsection (e) states:

> It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this subchapter involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than one year.

The Commission's position, expressed in its Compliance Manual (*see* sections cited above), in 29 C.F.R. § 1610.17(d), and in its brief and argument here, is that individual charging parties are not members of the "public" within the meaning of § 709(e), and that investigative materials may thus be disclosed to them and their attorneys either before or after litigation under Title VII is begun. Burlington argues

that charging parties are members of the public to whom nothing may be disclosed before litigation is begun, and that even after a private action is filed, notwithstanding that the charging parties purport to represent a class, the action itself only "involv[es] such information" as is directly relevant to discrimination against the individual charging parties. It insists, therefore, that nothing more may be disclosed. Burlington also argues that class actions, unlike private individual actions, should not be permitted while pattern and practice proceedings continue to pend before the Commission.

This case, of course, directly involves only the Commission's plans to disclose investigative material to private litigants who have filed actions under Title VII. If the Commission is correct, however, that charging parties are not members of the public, it would be free to disclose the material to them without regard to whether or not litigation had begun. Accordingly, we address this argument first, and reject it.

In our opinion the statutory scheme of enforcing Title VII is entirely inconsistent with the Commission's interpretation of § 709(e). Under the Civil Rights Act of 1964, the Commission had power only to investigate and attempt to conciliate employment discrimination charges, 42 U.S.C. § 2000e-5(a) (1970), and coercive enforcement could only be achieved by a private suit initiated by a charging party, 42 U.S.C. § 2000e-5(e) (1970). By 1972, Congress had become dissatisfied with the effectiveness of this enforcement scheme. *See* H.R. Rep. No. 92-238

(1971), reprinted in 2 U.S. Code Cong'l & Admin. News 2137, 2139-41, 2144 (1972). The Equal Employment Opportunity Act of 1972 amended Title VII of the Civil Rights Act to establish "an integrated, multistep enforcement procedure culminating in the EEOC's authority to bring a civil action in a federal court." *Occidental Life Insurance Company of California* v. *Equal Employment Opportunity Commission*, 432 U.S. 355, 359 (1977).

The right of an individual charging party to file a private action was preserved to allow escape from the "administrative quagmire" which could develop if a case could not promptly be processed by the Commission. *See* H.R. Rep. No. 92-238, *supra*, 2 U.S. Code Cong'l & Admin. News at 2147-48; *Occidental Life*, *supra* at 364-66. But there can be no doubt that the enforcement scheme enacted with the 1972 amendments lodged the primary responsibility for insuring equal employment opportunity with the Commission.[5] Because of the Commission's accumulated experience and expertise and its ability, through conciliation and pattern and practice litigation, to achieve results that will benefit an employer's entire workforce, "[t]he Commission has the basic responsibility to achieve the objectives of Title VII." H.R. Rep. No. 92-238, *supra*, 2 U.S. Code Cong'l & Admin. News at 2149. A section-by-section analysis of the amendments that was presented to the Senate before its final vote on the

[5] Indeed, even prior to the 1972 Act, "[c]ooperation and voluntary compliance [through the Commission's offices] were selected as the preferred means for achieving this goal." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

amending bill, 118 Cong. Rec. 4942 (1972), and that was put before both the Senate, 118 Cong. Rec. 7165, 7168 (1972), and the House of Representatives, 118 Cong. Rec. 7563, 7565 (1972), in conjunction with the Conference Report on the amendments, which analysis the Supreme Court has said "provides the final and conclusive confirmation of the meaning" of the private remedy provisions of the 1972 Act, *Occidental Life*, *supra* at 365, makes the primacy of the Commission's enforcement powers quite clear: "It is hoped that recourse to the private lawsuit will be the exception and not the rule, and that the vast majority of complaints will be handled through the offices of the EEOC." *See Sears, Roebuck and Company* v. *Equal Employment Opportunity Commission*, Nos. 77-1822, 77-1995, 77-1996 (D.C. Cir. June 9, 1978), slip op. at 4, 11.

We think it plain, and the Commission does not disagree, that the effect, and indeed the purpose, of disclosing investigative material to charging parties as if they were not members of the public would be to encourage the filing of private lawsuits. It is also obvious that this effect will necessarily undercut the preferred enforcement scheme of comprehensive negotiation and settlement. *Sears Roebuck*, *supra* at 11-12; and *see Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 461 (1975), by diffusing the energies of the employer and the EEOC and by injecting possibly unnecessary adversariness into the process of dealing with employment practices. Moreover, the disclosure policy, which the Commission argues is

appropriate, will almost certainly interfere with its ability to obtain voluntary cooperation with its investigative efforts. If employers know that whatever they provide to the Commission will be turned over to litigious charging parties, they will have an incentive to force the Commission to go to court under Section 709(c) of the Act to obtain the information sought, if only to obtain an enforceable court order that the information thus disclosed will not be disclosed further. *Sears, Roebuck, supra* at 13-14.[6] We find absolutely no reason to believe that the Congress intended, in enacting § 709(e), to undercut and hinder the primary means of enforcing equal employment opportunity merely to facilitate the filing of private litigation, which as we have said, was contemplated as a back-up remedy.[7] Accordingly, we hold, as did the

[6] As the court in *Sears, Roebuck* points out, the Commission has no apparent means of enforcing the nondisclosure agreement which it requires those to whom it discloses information to sign. *Id.* at 13.

[7] The Commission argues that in *Johnson, supra*, the Court, while recognizing the possible interference that a civil action under 42 U.S.C. § 1981 might create with the negotiation and settlement provisions of Title VII, expressly sanctioned such an effect as consistent with Congress' plain intentions. That, of course, is true, but the dispositive point is that the Court found a plain intention that Title VII only supplement and not supplant § 1981 remedies. There is absolutely nothing to suggest that Congress intended the secondary remedy of Title VII itself to wreak havoc on that title's intended primary remedy. Indeed, as we have indicated, the private action in Title VII was intended precisely as an *escape* from the primary remedy in cases where that remedy was not promptly effective. In apparent recognition of Congress' manifest

District of Columbia Circuit in *Sears, Roebuck*, that individual charging parties are members of the public under § 709(e) to whom investigatory materials may not be disclosed prior to the institution of judicial proceedings.

We recognize that in *H. Kessler & Company* v. *EEOC*, 472 F.2d 1147 (5th Cir. 1973)(en banc), *cert. denied*, 412 U.S. 939, the Fifth Circuit expressed the view that disclosure to an individual charging party of the contents of his individual investigation file was not a "public" disclosure. *Kessler* is subject to being distinguished on the basis of the limited disclosure involved there,[8] although it would seem, conceptually, that the definition of "public" ought to turn on who is to receive the information rather than how much may appropriately be given the recipient. We are constrained respectfully to disagree with *Kessler*, as did *Sears, Roebuck*, because *Kessler* gave no consideration to the weighty problems of undercutting the Commission's primary role in Title VII enforcement, and we think the decision's underlying concerns about the difficulties of obtaining counsel for a pri-

purpose, the Commission has promulgated regulations indicating that the Commission's typical response when a private action is filed is to cease pursuit of administrative remedy for the private litigant's claim. 29 C.F.R. § 1601.28 (a)(3). When this is done, naturally, there is nothing left of the primary remedy which the secondary private remedy could undercut.

[8] Such a distinction would not, of course, advance the Commission's position here, where much broader disclosure is planned.

vate action have been substantially alleviated by the 1972 Act. *See* 42 U.S.C. §§ 2000e-5(f)(1), 2000e-5(k); *Sears, Roebuck, supra* at 15-16.

Once a Title VII proceeding "involving [investigative] information" has been instituted, § 709(e)'s prohibition against making the information "public in any manner whatever" ceases. McBride and Butler have, of course, filed such a suit, and Burlington agrees that they are entitled to the investigative material to the degree it is directly relevant to their individual charges of discrimination.[9] The remaining question is whether because they filed a class action suit, they are entitled to information not directly relevant to their individual charges but which is relevant to the allegations of discrimination against the broader class.

Burlington's first argument here is that class actions themselves should not be permitted while the Commission pursues pattern and practice remedies. We agree with Burlington that the maintenance of such actions could hinder effective negotiation and settlement in the Commission, but we disagree with

[9] The Commission advises us that there no longer are unitary files on the investigation of McBride's or Butler's individual charges, the materials having been consolidated with the national investigation file. We agree with the parties that no one's rights should be determined on the basis of the label attached to an investigation file. To the degree material in the national investigation file either was or would normally have been gathered in the individual investigations of McBride's or Butler's charges, disclosure would be appropriate. *Mosley* v. *General Motors Corp.*, 10 F.E.P. Cases 1442, 1445 (E.D. Mo. 1975).

its conclusion. In contrast to § 709(e), which plainly evinces Congressional intent to limit the use of information gathered in Commission investigations, there is nothing in the statute to suggest that a private party with a right to file an action may not attempt to do so on behalf of a class. Were we inclined to imply such a limit, the legislative history would cure us of the inclination. The section-by-section analysis of the 1972 amendments to Title VII, referred to above, clearly states that in establishing the enforcement provisions of the 1972 Act, "it is not intended that any of the provisions shall affect the present use of class action lawsuits under Title VII in conjunction with Rule 23 of the Federal Rules of Civil Procedure." 118 Cong. Rec. 7168, 7565 (1972). The analysis points out that a "provision limiting class actions was contained in the House bill and specifically rejected by the Conference Committee." *Id.* We need not consider the extent to which the pendency of EEOC pattern and practice proceedings might influence a district judge's discretion in deciding whether to certify a class in any given action, *see, e.g., Franklin* v. *General Electric Co.*, 15 F.E.P. Cases 1084 (W.D. Va. 1977), for that question is not before us. It is enough to say that Congress has left the class action device open in Title VII cases.

But that is not the same thing as saying that the Commission ought to undercut the effective performance of its important responsibilities by providing self-styled class representatives with the mass of free discovery that could be expected to be found in

the files of a national investigation by the Commission. At least prior to certification of a class, the investigative information "involv[ed]" in a private Title VII action, within the meaning of § 709(e), is only that directly relevant to the individual plaintiff's claims. The Commission may disclose no more than that to the private litigant.[10] Any broader construction of the Commission's power to disclose its investigation's fruits would create the very real risk we have discussed above, that the Commission in its zeal to aid those engaged in the secondary enforcement of Title VII will emasculate its ability to proceed effectively with what Congress in no uncertain terms intended to be the primary means of insuring equal employment opportunity.

For the reasons stated herein, the judgment of the district court is reversed, and the case is remanded for further proceedings consistent herewith. Pending disposition by the district court on remand, this court's unpublished order of May 9, 1978, that the Commission make no disclosures of the pertinent information will remain in effect. Circuit Rule 18 will not apply on remand.

[10] We note, in this regard, that the language of § 709(e) was contained in the Civil Rights Act of 1964, pursuant to the terms of which the Commission had no jurisdiction to pursue pattern and practice remedies. The investigative files compiled prior to the 1972 amendments, then, would not be expected to contain any more than information relevant to individual charges. This confirms our interpretation that the cessation of the prohibition against disclosure when a proceeding "involving such information" was initiated was never intended as authority to disclose information not relevant to the charges brought by the individual(s) initiating the proceeding.

REVERSED AND REMANDED.

A true Copy:
Teste:

Clerk of the United States Court of
Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

August 15, 1978

Before

HON. WILBUR F. PELL, JR., *Circuit Judge*

HON. WILLIAM J. BAUER, *Circuit Judge*

HON. ROY W. HARPER, *Senior District Judge**

No. 78-1486

BURLINGTON NORTHERN, INC., PLAINTIFF-APPELLANT,

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS AND STATION EMPLOYEES, INTERVENING PLAINTIFFS-APPELLANTS,

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL., DEFENDANTS-APPELLEES,

WILLIAM E. MCBRIDE, WILLIAM H. BUTLER, and DUBOIS GILLIAM, INTERVENING DEFENDANTS-APPELLEES.

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* Senior Judge Roy W. Harper of the Eastern and Western Districts of Missouri sat with the panel by designation and heard oral argument. He thereafter disqualified himself from further consideration of the case, and did not participate in the preparation or issuance of this opinion.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 78-C-1257 JOHN POWERS CROWLEY, *Judge*

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, and the case is REMANDED, in accordance with the opinion of this court filed this date.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 78 C 1257

BURLINGTON NORTHERN, INC., PLAINTIFF,

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL., DEFENDANTS.

ORDER

This cause coming on to be heard on plaintiff's motion for preliminary and permanent injunctive relief against the disclosure of certain investigative files of the Equal Employment Opportunity Commission, and the Court having considered affidavits in support of said motion and in opposition thereto, and having heard oral argument, and the Court having adopted the affidavits of Bruce B. Elfvin, Senior Trial Attorney, Equal Employment Opportunity Commission, and the Court's findings of fact and conclusions of law, as stated at the hearing on the temporary restraining order held on April 7, 1978, and at the hearing on April 10, 1978, it is

1. ORDERED that said motion be and hereby is denied; and that judgment be entered in favor of defendant, Equal Employment Opportunity Commission and against plaintiff, Burlington Northern Inc.;

2. ORDERED that the defendant Equal Employment Opportunity Commission shall stay until May 10, 1978, disclosure of the factual data contained in the investigatory case file on charge #TMK5C-0274 to counsel for plaintiffs in McBride, et al. v. Burlington Northern, Inc., C.A. #78 C 269, U.S. District Court for the Northern District of Illinois, Eastern Division; provided however, that this data shall not be further disclosed by counsel for McBride, et alia, except in the course of that pending Title VII litigation.

3. ORDERED that plaintiffs in *McBride, et al.* v. *Burlington Northern Inc., supra,* are hereby allowed to intervene in the instant action as parties defendant.

/s/ John Powers Crowley
JOHN POWERS CROWLEY
United States District Judge

DATED: April 10, 1978.

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